

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

HUGO JUAREZ,

Defendant and Appellant.

B214516

(Los Angeles County
Super. Ct. No. KA058374)

APPEAL from a judgment of the Superior Court of Los Angeles County. Bruce F. Marrs, Judge. Affirmed.

Murray A. Rosenberg, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Steven D. Matthews and Herbert S. Tetef, Deputy Attorneys General, for Plaintiff and Respondent.

Hugo Juarez appeals his upper term sentence on Sixth Amendment grounds. We affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

In 2003, Juarez was sentenced to the upper term of nine years in prison for carjacking (Pen. Code,¹ § 215, subd. (a)), plus an additional 10 years for the personal use of a firearm (§ 12022.53, subd. (b)). In the course of his appeals, this court affirmed the constitutionality of his sentence in 2005 under *People v. Black* (2005) 35 Cal.4th 1238 (*Black I*) (*People v. Juarez* (Dec. 12, 2005, B165580) [nonpub. opn.]), and the California Supreme Court denied review in 2006. Once the United States Supreme Court abrogated *Black I* in *Cunningham v. California* (2007) 549 U.S. 270, Juarez obtained conditional habeas corpus relief in federal court. The federal court ordered that Juarez's upper term sentence be treated as a middle term sentence or that he be resentenced.

On February 26, 2009, the trial court resentenced Juarez to his original sentence: the upper term of nine years, plus 10 years for the personal use of a firearm. The court found, in aggravation, that the crime involved planning and sophistication and that the victim was particularly vulnerable; and in mitigation, that Juarez had no prior record. Juarez appeals.

DISCUSSION

Juarez contends that the trial court violated the Sixth Amendment when it resentenced him to the upper term based on aggravating factors not found by a jury, but there was no constitutional error here. Juarez was sentenced in February 2009, well after the Legislature amended section 1170, subdivision (b) to remove the former presumption that the middle term would be imposed and also long after the California Supreme Court

¹ Unless otherwise indicated, all further statutory references are to the Penal Code.

judicially reformed the former sentencing law to conform to the newly enacted sentencing law. (*People v. Sandoval* (2007) 41 Cal.4th 825, 849, 852.) Under the new law, a court must exercise its discretion in selecting among the three available terms but no additional findings of fact are now required to impose an upper or lower term. (§ 1170, subd. (b); *Sandoval*, at pp. 843-845.) Accordingly, at resentencing Juarez was not legally entitled to the imposition of the middle term, and the trial court could constitutionally rely on aggravating factors not submitted to a jury as a basis for imposing the upper term anew. “[A] defendant who has established prejudicial Sixth Amendment error under *Cunningham*. . . is entitled to be resentenced under a scheme in which the trial court has full discretion to impose the upper, middle, or lower term, unconstrained by the requirement that the upper term may not be imposed unless an aggravating circumstance is established. Under our holding in *Sandoval*, if a defendant is successful in establishing *Cunningham* error on appeal, the trial court is not precluded from imposing the upper term upon remand for resentencing. The defendant is entitled only to be resentenced under a constitutional scheme and is afforded the opportunity to attempt to persuade the trial court to exercise its discretion to impose a lesser sentence.” (*People v. French* (2008) 43 Cal.4th 36, 45-46.)

DISPOSITION

The judgment is affirmed.

ZELON, J.

We concur:

PERLUSS, P. J.

JACKSON, J.